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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 499th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 7 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 11 (continued)

1. Ms. ZIMMERMAN (Canada) said that, after informal consultations during the lunch break, her delegation wished to withdraw its proposal that the words "for inspection by" be replaced by the word "to" in paragraph (3).

2. Mr. WALLACE (United States of America) said his delegation had considered the Canadian proposal to have merit and would have liked the same change to be made in paragraph (2) of article 11 as well. As they stood, paragraphs (2) and (3) were unnecessarily limiting.

3. Mr. JAMES (United Kingdom), having expressed support for the remarks just made by the representative of the United States of America, said that he had misgivings about the written comments of the Canadian Government, where there was reference to the "debriefing" of bidders. The Model Law should provide for at least the inspection of the relevant portions of records.

4. Recalling that during the previous meeting it had been agreed that a subparagraph (1) should be added to paragraph (1), he said that a reference to that subparagraph would presumably also have to be included in paragraph (3).

5. Regarding the question of the representative of Thailand about non-disclosure on national security grounds, the point was probably covered by the phrase "would not be in the public interest" in subparagraph (3) (a). With regard to the phrase "shall not disclose", he felt that non-disclosure on the grounds that disclosure would be contrary to law, would impede law enforcement or would not be in the public interest might be dealt with in general legislation regarding confidentiality, but that non-disclosure on the grounds that disclosure would prejudice legitimate commercial interests of the parties or would inhibit fair competition and non-disclosure of information of the kind to which subparagraph (3) (b) related should be covered by legislation on procurement. At all events, as far as those two questions were concerned, he felt that paragraph (3) should remain unchanged.

6. Mr. WALLACE (United States of America), endorsing the remarks of the representative of the United Kingdom regarding the phrase "shall not disclose", said it was important that the provision remain in a mandatory form, in order to maintain both confidentiality and the integrity of the procurement process. Perhaps a comment could be included in the Guide to Enactment.

7. Mr. BONELL (Italy) expressed agreement with the representatives of the United Kingdom and the United States of America.

8. The CHAIRMAN said he took it that the Commission wished to retain the word "shall" in paragraph (3).

9. It was so decided.

10. The CHAIRMAN invited the Commission to consider the two proposals made by the Secretariat. The first one was to end the first sentence of paragraph (3) after "procurement contract" and to have a second sentence reading "Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court." The second one was to add the phrase "beyond the summary referred to in subparagraph (1) (e)" at the end of subparagraph (3) (b).

11. He took it that the Commission wished to approve those proposals.

12. It was so decided.

13. Mr. RAO (India) suggested that the words "for inspection by" be replaced by the words "on request to".

14. Mr. BONELL (Italy) said he had no objection to that suggestion, although he had assumed that portions of records would be made available only on request.

15. Mr. WALLACE (United States of America) said that he would prefer the text to read "made available for inspection or otherwise", but could go along with the suggestion made by the representative of India.

16. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. TUVAYANOND (Thailand), pointed out that paragraph (2) talked of making portions of records available "for inspection by any person", whereas paragraph (3) talked of making them available "for inspection by suppliers or contractors" only. Recalling what the representative of the United States of America had said a little earlier about paragraph (2), he said that, in his opinion, it was in order to hand over portions of records to suppliers or contractors, in order that they might compare and check figures, but not to persons other than suppliers or contractors.

17. The CHAIRMAN said that, as he saw it, the purpose of article 11 was to promote accountability and transparency. The procuring entity was under an obligation to keep records so that suppliers and contractors could seek meaningful review if the need arose. At the same time, the Model Law established two types of disclosure, one for the public at large and the other for contractors and suppliers if they so demanded. In a situation where the procuring entity was requested by a contractor or supplier to make a disclosure, the level of disclosure need not go beyond the summary. On the other hand, a situation was foreseen in the Model Law in which, even if a contractor or supplier made a request, no disclosure need be made save on the orders of a court. The balance achieved by the Model Law was a good one, taking care of the interests of the procuring entity and of contractors and suppliers.

(The Chairman)

18. He took it that the Commission wished to approve the replacement of the words "for inspection by" by the words "on request to" in paragraph (3).

19. It was so agreed.

20. It was further agreed that the same amendment should be made in paragraph (2).

21. Mr. BONELL (Italy) suggested that the phrase "for monetary damages solely as a result of failure" in paragraph (4) be replaced by "for damages due to failure", which was the more usual wording in such cases.

22. Mr. TUVAYANOND (Thailand) said that the word "prepare" should be replaced by the word "keep" in order to be consistent with what had been decided regarding paragraph (1).

23. Mr. GRIFFITH (Observer for Australia) wondered whether it was necessary to mention "damages"; the paragraph could perhaps read "The procuring entity shall not be liable to contractors and suppliers because of failure ...".

24. Mr. SAHAYDACHNY (Secretariat) said that, as he recalled it, the Working Group had felt that mere omissions from the record, which would be unintentional in most cases, should not give rise to monetary damages, but it had not wished to preclude the possibility of injunctive or other forms of relief.

25. Mr. BONELL (Italy) said that, in spite of that explanation, he would still like to see the deletion of the word "monetary".

26. Mr. WALLACE (United States of America) said he supported the suggestion made by the representative of Italy.

27. Mr. LEVY (Canada), supporting the suggestion made by the Italian representative, said that paragraph (4) would then presumably read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record ...".

28. It was his recollection that, when that paragraph had been discussed in the Working Group, the need had been felt to balance the necessity for record-keeping against ensuring that there was no penalty for a procuring entity that failed to carry out what was basically an administrative task. It had therefore been decided that there would be a requirement for the procuring entity to keep a record but, in the event of failure to do so, suppliers and contractors would not be able to sue it for damages. The assumption was that the procuring entity would also be subject to the general laws of the country and that such matters could be dealt with in other ways.

29. The observer for Australia had talked about deletion of the word "damages". However, use of the words "shall not be liable to contractors and suppliers" would remove the requirement for injunctive relief, which some delegations considered to be necessary.

30. Mr. PEREZNIETO CASTRO (Mexico), having expressed support for the suggestion made by the representative of Italy, said that use of the word "liable" in the English version of paragraph (4) suggested that the common law view had predominated during the drafting of that paragraph; in civil law systems, the focus was on "responsibility", which was not quite the same thing as "liability". In the Spanish version, the word "deberá" was used, with no reference to either responsibility or liability.

31. In response to the comment of the Canadian representative regarding injunctive relief, he said that most civil law systems did not have injunctions.

32. Mr. JAMES (United Kingdom) said that it had been agreed in the Working Group that there would be no liability for damages, but there would be liability either for injunctive relief or for administrative law action. It was crucial to retain the idea of liability for damages, although it was not necessary to specify "monetary" damages.

33. Mr. GRIFFITH (Observer for Australia) withdrew his suggestion that the reference to "damages" be deleted.

34. Mr. KLEIN (Observer for the Inter-American Development Bank) said he did not see why a procuring entity that was incapable of keeping records should not pay damages to a supplier or contractor for its failure to comply with such an essential requirement. He would prefer it if paragraph (4) were deleted.

35. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had been concerned that a simple reference to exclusion of liability might be taken to exclude all forms of relief. That was why the word "monetary" had been inserted.

36. The CHAIRMAN called on the Commission to adopt paragraph (4) amended to read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record ...".

37. It was so decided.

Article 12

38. Ms. ZIMMERMAN (Canada), referring to document A/CN.9/376/Add.1, said that, as it was currently worded, article 12 did not catch inducements offered through an agent of a supplier or contractor. To correct that, her delegation suggested the insertion of the words "directly or indirectly" in the third line after "submitted it". The present wording referred only to any "current or former officer or employee of the procuring entity". In order to broaden the scope of the provision, her delegation suggested the addition, in the fourth line, of the words "State or the" before "procuring entity". If the Commission were prepared to accept that proposal, it would also be necessary to refer to "the State or the procuring entity" in the seventh line.

39. Mr. SOLIMAN (Egypt) asked whether it was necessary to provide for cases where officers or employees of the procuring entity refrained from performing certain acts.

40. Ms. ZIMMERMAN (Canada) said she thought that cases of omission - as well as of commission - should be covered. Perhaps the reference to "decision" in the seventh line of article 12 covered both.

41. Mr. TUVAYANOND (Thailand), supporting the inclusion of the words "directly or indirectly", said he had doubts about the wisdom of inserting a reference to the State; it would be necessary, for the sake of consistency, to insert such references throughout the Model Law as the procuring entity acted on behalf of the State. In international forums, the bona fides of States was normally presumed.

42. He agreed with the Canadian view that the reference to "decision" covered cases of commission and omission.

43. In place of "a gratuity, whether or not in the form of money", he suggested the words "a gratuity or benefit in any form".

44. Mr. LEVY (Canada) said that, in suggesting the inclusion of a reference to the State, his delegation did not wish to cast doubt on the bona fides of any State. It was concerned about inducements offered to high officials of the State who were not employed by the procuring entity but were in a position to exercise influence.

45. Mr. WALLACE (United States of America) suggested that the final sentence begin with the words "Such rejection" rather than "The rejection".

46. Mr. RAO (India) expressed support for the amendments proposed by Canada, including the proposed insertion of a reference to the State.

47. Mr. MORAN BOVIO (Spain) also expressed support for the insertion of such a reference.

48. Mr. TUVAYANOND (Thailand) suggested that a reference to "relevant authorities" might be preferable.

49. Mr. WALLACE (United States of America) suggested the phrase "of the procuring entity or other governmental authority"; there were several references to "governmental authority" in the Model Law.

50. Mr. TUVAYANOND (Thailand) agreed.

51. Mr. LEVY (Canada) said that, if the words "the State or" were inserted, it should be made clear that the "officer or employee" was an officer or employee of the Government of the State or of the procuring entity - certainly not the constitutional head of State.

52. Mr. BONELL (Italy) suggested the phrase "of the procuring entity or any other relevant authority".

53. Mr. NICOLAE-VASILE (Observer for Romania) proposed the insertion, after the word "if", of the phrase "evidence is furnished that".

54. The CHAIRMAN suggested that the proposal made by the observer for Romania be reflected in the Guide to Enactment. On the basis of the discussion so far, article 12 might read as follows:

> "(Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it directly or indirectly offers, gives or agrees to give to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity or other governmental authority in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor."

55. The wording read out by the Chairman was adopted.

56. Mr. HERRMANN (Secretary of the Commission) said that insertion of the phrase "directly or indirectly" had often been proposed in the past in order to cover situations where an agent might be involved, but the Commission had always decided against inserting it so as to avoid its frequent repetition. Use of the phrase in article 12 should be regarded as exceptional, and it must not prompt the conclusion that references elsewhere in the text to acts of the procurement entity excluded acts of an agent.

57. The CHAIRMAN proposed that the Commission defer consideration of article 9 until documents A/CN.9/XXVI/CRP.2 and 3 had been available for some time in all of the Commission's working languages and that the Commission now take up chapter II of the Model Law.

Article 13

58. Ms. PIAGGI-VANOSSI (Argentina) suggested that the title of article 13 be changed from "Methods of procurement" to "Selection procedures".

59. The CHAIRMAN said that the matter appeared to be purely one of drafting.

60. Mr. TUVAYANOND (Thailand) said that paragraph (13) (1) appeared to limit the freedom of Governments in certain fields, such as national security, and suggested that consideration of that paragraph be postponed until various articles later in chapter II had been discussed.

61. Mr. HUNJA (Chairman of the Working Group) said that paragraph (13) (1) contained one of the most important provisions of the draft Model Law. Before discussing other methods of procurement, the Commission should agree on the principle enshrined in it - namely, that a procuring entity should normally employ tendering proceedings. Any difficulties which delegations had in that respect should be resolved at the outset.

62. Mr. WALLACE (United States of America) suggested that the Commission first discuss chapter II in its entirety, paragraph by paragraph. It could then approve articles 13, 14, 15 and 16 in the light of proposed drafting changes.

63. Mr. TUVAYANOND (Thailand) welcomed that suggestion.

64. Mr. LEVY (Canada) said that the entire Model Law rested on the principle that tendering was the preferred method of procurement. That principle should be endorsed before consideration was given to exceptions and to problems. He therefore felt it would be undesirable to leave paragraph (13) (1) in abeyance.

65. Mr. PEREZNIETO CASTRO (Mexico), referring to the remarks of the representative of Thailand, recalled that subparagraph (2) (a) of article 1 provided for the exemption of procurement involving national security or national defence from the scope of application of laws based on the Model Law. Moreover, subparagraph (2) (b) enabled enacting States to specify other types of procurement to be excluded. Hence there was no limitation of the freedom of Governments.

66. Mr. TUVAYANOND (Thailand) said he had no intention of undermining the principle that tendering proceedings were the best method of procurement. He merely wished to reserve his position in respect of paragraph (13) (1) until he could be sure that its wording would be compatible with national interests.

67. The CHAIRMAN proposed that the Commission approve article 13 in principle. In the course of its examination of articles 13 to 42, it might wish to return to previous articles in chapter II and consider proposed amendments to them.

68. It was so decided.

Article 14

69. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to the chapeau of subparagraph (1) (a) proposed in document A/CN.9/377, said that, even if the procuring entity was able to formulate detailed specifications, the nature of the goods and uncertainty about the specifications might prompt it to use one of the methods of procurement referred to in article 14 other than tendering proceedings.

70. Mr. WALLACE (United States of America) said the Secretariat's proposal touched on an issue that had been hotly contested in the Working Group, which had given precedence to formal competitive bidding in article 13 (1) and where there had been opposition even to the mention of competitive negotiation in the Model Law.

71. In his view, the expression "unable to formulate" was objective, whereas "prefer not to formulate" was not. Moreover, the latter phrase would make it easier for Governments to delay giving specifications and then to opt for competitive negotiation or two-stage tendering. The words "unable to" should be retained, or at least language more careful than "prefer not to" chosen.

72. Mr. JAMES (United Kingdom) said that, for the reasons stated by the representative of the United States of America, he was not in favour of the amendment proposed by the Secretariat. He endorsed the principle, expressed in article 13 (1), that tendering proceedings were the best method of procurement. There were exceptions, but they should be rigorously circumscribed.

73. Mr. LEVY (Canada) expressed surprise at the fact that the Secretariat had proposed such an amendment.

74. The CHAIRMAN said that the Secretariat had decided to withdraw its proposal.

75. Mr. TUVAYANOND (Thailand) said that, although the Secretariat had withdrawn its proposal regarding subparagraph (1) (a), he would suggest that the chapeau be amended to read "for the procuring entity the formulation of detailed specifications is not feasible"; in some cases, what was possible might not be feasible.

76. Mr. JAMES (United Kingdom), welcoming the suggestion made by the representative of Thailand, said the concept of "feasibility" lay between "inability" and "free choice". The matter could be brought to the attention of the drafting group.

77. Mr. PEREZNIETO CASTRO (Mexico), expressing preference for the phrase "is unable to", said that the procuring entity was not being given carte blanche; paragraph (2) of article 13 required a statement of the grounds and circumstances - for example, its inability to formulate the necessary detailed specifications - justifying the use of a method of procurement other than tendering procedures.

78. Mr. SAHAYDACHNY (Secretariat) introduced the amendment to subparagraph (1) (a) (ii) proposed in document A/CN.9/377.

79. Mr. JAMES (United Kingdom) said that, in his opinion, the proposed amendment did not merely represent a drafting improvement; it actually changed the meaning of the present text. The present wording provided for the situation where the procuring entity did not know how to solve a problem and felt it necessary to approach a supplier for advice; such a situation called for a two-way relationship from the very beginning because of the technical nature of the goods - such as computer software - or construction, not because the specifications could not be established with sufficient precision.

80. Mr. ANDERSEN (Denmark), recalling that the United Kingdom representative had mentioned computer software, said that in the case of standard software the specifications would be available and there would accordingly be nothing to negotiate about. Specialized software was a different matter; it lay outside the scope of application of the Model Law.

81. Mr. WALLACE (United States of America) said that, given the changes that were likely to be made to the chapeau of subparagraph (1) (a), the proposal made by the Secretariat regarding subparagraph (1) (a) (ii) was largely redundant. At the same time, he was not convinced that subparagraph (1) (a) (ii) should be retained in its present formulation.

82. Ms. PIAGGI-VANOSSI (Argentina) said that in article 14 there should be provision for pointing out and correcting technical and legal errors in the solicitation documents and in the contract. For example, a procuring entity might be seeking equipment that was obsolete or technically inappropriate. The tenderer drawing attention to such an error should not be allowed to enjoy a special advantage; the other tenderers should be informed of it so as to ensure equal treatment for all.

83. The CHAIRMAN, noting that the concerns raised by the representative of Argentina appeared to be dealt with in article 23, said that the Secretariat had decided to withdraw its proposal relating to subparagraph (1) (a) (ii) and that he took it that the Commission wished to adopt that subparagraph as it stood.

84. It was so decided.

The meeting rose at 5 p.m.